STATE OF MICHIGAN

COURT OF APPEALS

LJULJA LJUCOVIC, Individually and as Next Friend of DONNY LJUCOVIC, a minor,

Plaintiffs-Appellants,

v

COLLEEN GRACE STEINKIRCHNER, a/k/a COLLEEN CORBEAU, a/k/a COLLEEN BREWER,

Defendant,

and

ARBOR DRUGS, INC.,

Defendant-Appellee.

UNPUBLISHED
September 12, 2000

No. 211120
Oakland Circuit Court
LC No. 96-521060 NI

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiffs Ljulja and Donny Ljucovic appeal as of right from a jury verdict in favor of defendant-appellant Arbor Drugs, Inc., finding no cause of action in this dramshop action. We affirm.

On October 26, 1993, Ljulja Ljucovic was driving a vehicle in which her minor son, Donny Ljucovic, was a passenger when a vehicle driven by Colleen Steinkirchner[1] made an untimely left turn and collided head-on with plaintiff's vehicle. A few hours before the accident, Steinkirchner consumed a 750 ml bottle of wine at her apartment. Around 6:00 p.m. that evening, Steinkirchner drove to Arbor Drugs located at 14 Mile Road and Haggerty Road in the City of Farmington Hills to purchase more wine. At 6:14 p.m., Steinkirchner purchased a four package of 187 ml bottles of Sutter Home wine from an Arbor Drugs' cashier. Steinkirchner presented her identification to the cashier and paid cash

[1] We use the term defendant to refer only to Arbor Drugs.

for the wine, but did not converse with any of the sales people or the cashier. Steinkirchner then left Arbor Drugs, returned to her vehicle, and consumed approximately two of the four 187 ml bottles of Sutter Home wine she purchased at Arbor Drugs. Steinkirchner proceeded to drive about ¼ of a mile south on Haggerty Road toward Village Green Apartments where she lived. As she approached the entrance to the apartment complex, she stopped briefly and then made a sudden left turn into the complex. However, instead of completing the left turn, she veered directly into oncoming traffic, colliding head-on with plaintiff's vehicle, which was traveling north on Haggerty Road.

Plaintiffs filed the instant lawsuit alleging automobile negligence against Steinkirchner, and dramshop liability against Arbor Drugs for selling wine to Steinkirchner when she was visibly intoxicated.[2] A default judgment was entered against Steinkirchner on the issue of liability after she failed to appear and the jury awarded damages on that claim in the amount of $5,000 to Ljulja Ljucovic and $90,000 to Donny Ljucovic. Ljulja's dramshop claim against Arbor Drugs was dismissed on a motion for directed verdict at trial. Donny's dramshop action was submitted to the jury; however, the jury returned a no cause of action verdict in favor of Arbor Drugs, finding that although Donny was injured by Steinkirchner, Arbor Drugs did not sell wine to Steinkirchner at a time when she was visibly intoxicated.

Plaintiffs argue that the trial court erred in excluding opinion testimony from lay witness Wanda DiPonio that plaintiff was intoxicated at the time of the accident. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999), citing *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995). "Opinion testimony from a lay witness is permitted when it is rationally based on the witness' perception of the incident and when it is helpful to a clear understanding of" the facts at issue. *Co-Jo, Inc v Strand*, 226 Mich App 108, 116; 572 NW2d 251 (1997), citing MRE 701; see also *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999).

DiPonio testified at her deposition and in an offer of proof made at trial that she observed Steinkirchner turn into oncoming traffic and collide with plaintiffs' vehicle and that, based on this conduct, she believed Steinkirchner was "either nuts or . . . drunk." DiPonio further testified that she did not talk to Steinkirchner, did not get close enough to her to smell intoxicants, did not observe Steinkirchner's eyes, and only briefly observed Steinkirchner for a few minutes after the accident from approximately twenty feet away, at which time Steinkirchner appeared to be stumbling as she walked to the curb. DiPonio explained that, based on these observations, she did not believe Steinkirchner's conduct was that "of a sober or sane person."

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[2] Arbor Drugs filed a cross-complaint against Colleen Steinkirchner seeking full indemnification for all damages awarded against it. However, Arbor Drugs dismissed the cross-claim after the no cause of action verdict was rendered.

We do not find that the trial court abused its discretion in excluding opinion testimony from DiPonio that Steinkirchner was intoxicated at the time of the accident. DiPonio's opinion was based solely on her observations of Steinkirchner turning her vehicle into oncoming traffic and staggering when she exited her vehicle and walked to the curb after the accident. In fact, DiPonio admitted during her deposition that her conclusion that Steinkirchner was intoxicated based on an improper turn was merely speculation and that Steinkirchner's staggering may well have been caused by a factor other than intoxication (e.g., injured leg, shock from accident). In the absence of specific, objective factors supporting DiPonio's opinion that Steinkirchner was intoxicated, we agree with the trial court that her opinion was not a reliable conclusion based on a rational perception of Steinkirchner, cf. *Heyler v Dixon*, 160 Mich App 130, 144-147; 408 NW2d 121 (1987); *Lasky v Baker*, 126 Mich App 524, 530-531; 337 NW2d 561 (1983), and would not have assisted the jury in understanding her testimony or resolving the factual issue. DiPonio properly testified to her observations of Steinkirchner immediately after the accident and the jury was free to draw its own inferences and conclusions from her testimony. MRE 701; *McPeak, supra*.

Plaintiffs next argue that the trial court erred in excluding evidence and testimony relating to the Techniques of Alcohol Management (TAM) used by Arbor Drugs to train its cashiers. We disagree.

The TAM is a training process developed by the Michigan Licensed Beverage Association to make vendors of alcohol and their employees aware of their duties under the law regarding the sale of alcohol to visibly intoxicated persons and to provide guidance to sellers on how to determine when a person is visibly intoxicated. Arbor Drugs used the TAM as part of its internal training of cashiers. Plaintiffs assert a number of reasons why the TAM should have been admitted at trial, none of which we find convincing.

Plaintiffs first contend that the dramshop act is silent on the standard of care to be used by vendors of alcohol, thus, the TAM was admissible to assist the jury in understanding the standard of care Arbor Drugs and its cashiers should have followed when it sold the wine to Steinkirchner.

The Michigan Liquor Control Act in effect at the time of this action provided in pertinent part:

> A retail licensee shall not . . . directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated. [MCL 436.22(3); MSA 18.993(3).][3]

A person is visibly intoxicated when "his or her intoxication would be apparent to an ordinary observer." *Heyler, supra* at 145-146, quoting SJI2d 75.02; see also *Miller v Ochampaugh*, 191

[3] After this action was filed, the Michigan Liquor Control Act was repealed and the Michigan Liquor Control Code of 1998 was enacted, 1998 PA 58, effective April 14, 1998. The relevant language in the new statute does not differ from that cited in the text; however, the statute is now cited as MCL 436.1801(2); MSA 18.1175(801).

Mich App 48, 57; 477 NW2d 105 (1991). Thus, contrary to plaintiffs' contention, the dramshop act and case law indeed define the requisite standard of care for licensees.

In fact, plaintiffs concede throughout their brief that the dramshop act imposes a duty on licensees not to sell alcohol to a visibly intoxicated individual, and that an objective standard is used to determine whether an individual is visibly intoxicated to an ordinary observer. See *Miller*, *supra* at 57-58. Thus, the relevant inquiry in a dramshop action is whether the allegedly intoxicated person would have been visibly intoxicated to an ordinary observer, *not* whether the particular sales person or licensee involved in the claim actually found visible intoxication. *Id.* Under this objective standard, whether a licensee had certain practices or procedures in place to assess intoxication, and whether a particular cashier actually followed his employer's practices or procedures when selling alcohol to an individual, is irrelevant. The only question the jury must decide is whether, under the circumstances presented, the allegedly intoxicated individual would have appeared intoxicated to an ordinary observer at the time of the sale. *Id.* at 60.

Applying these principles to the facts of this case, we conclude that whether Arbor Drugs used the TAM to educate its cashiers on the law regarding dramshop liability or to train its cashiers on how to determine whether an individual is visibly intoxicated, is irrelevant. The law does not impose a duty on licensees to comply with certain policies or procedures when selling alcohol. See *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 764-765; 431 NW2d 90 (1988). The only duty Arbor Drugs had under the law was not to sell alcoholic beverages to a visibly intoxicated individual. Thus, whether Arbor Drugs used the TAM and whether its employees complied with the TAM were not germane to the issue of dramshop liability in this case.

Plaintiffs further argue that because the dramshop act allowed retail licensees to present evidence of its "business practices" and procedures in defense of a civil action, plaintiffs should also have been permitted to introduce evidence of the TAM to show that Arbor Drugs did not comply with those practices and procedures.

MCL 436.22h(1); MSA 18.993(8)(1) states in pertinent part:

> In defense of a civil action under section 22, a retail licensee may present evidence that at the time of the selling, giving or furnishing of the alcoholic liquor, the retail licensee was adhering to responsible business practices. Responsible business practices are those business policies, procedures, and actions which an ordinarily prudent person would follow in like circumstances.

This provision of the dramshop act, by its express terms, only allows *retail licensees* to present evidence of business practices, policies or procedures *in defense of a civil action*. It does not afford plaintiffs the right to introduce similar evidence in order to establish liability. Where statutory language is clear and unambiguous, judicial construction and interpretation is neither necessary nor appropriate. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). According to the plain language of the statute, the Legislature clearly intended to afford licensees the opportunity to defend their actions by showing that they adhered to "responsible business practices" according to an

"ordinarily prudent person" standard. Had the Legislature intended to allow plaintiffs to use the same evidence to establish liability, it would have expressed its intent by including appropriate language in the statute. The Legislature did not do so, and we decline to read such language into the statute.

Plaintiffs also contend in two conclusory sentences that an interpretation of the statute affording only licensees the right to use evidence of business practices in defense of a lawsuit violates the Equal Protection Clauses of the United States and Michigan Constitutions. Plaintiffs have failed to provide any factual discussion or legal authority in support of their contention. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). Thus, we decline to review this claim. *Id.*

With respect to plaintiffs' claim that the trial court improperly excluded deposition testimony from David Stern concerning the TAM, we note that Stern's deposition testimony was not transcribed and made part of the lower court record and is thus unavailable for review on appeal. Appeals to this Court are heard on the original record. MCR 7.210(A). Without the deposition testimony, we are unable to fully review this claim. Accordingly, plaintiffs' appellate challenge to the exclusion of this evidence is deemed waived. *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 674 (1997); *Taylor v Blue Cross and Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994).

In a related argument, plaintiffs claim that the trial court erred in excluding testimony from Arbor Drugs' store manager, Timothy Block, regarding whether, based on the information contained in the TAM, Stern and other Arbor Drugs employees would have perceived Steinkirchner as intoxicated at the time of the sale. We conclude, as we did above, that an objective, reasonable person standard is used to determine visible intoxication and the reasonable person in this case was the jury. It is irrelevant whether Block, Stern, or any other Arbor Drugs employee would have subjectively perceived Steinkirchner as visibly intoxicated at the time of the sale. *Miller*, *supra* at 57-58. Accordingly, we find no abuse of discretion in the trial court's ruling.

Plaintiffs next contend that the trial court erred in excluding evidence of Steinkirchner's attempt to escape police custody at the hospital after the accident.

After reviewing the record, we agree with the trial court that evidence pertaining to Steinkirchner's attempt to escape police custody, while relevant to the issue of Steinkirchner's negligence, was irrelevant to any issue in the dramshop action against Arbor Drugs. Because Steinkirchner was defaulted on the issue of liability in the automobile negligence claim, we find no basis for the admission of this evidence. The dispositive issue in the dramshop action against Arbor Drugs was whether Steinkirchner appeared visibly intoxicated to an ordinary observer at the time she purchased the wine before the car accident. Steinkirchner's behavior and her level of intoxication several hours after she purchased the wine, and after she consumed two additional 187 ml bottles of wine, was neither relevant nor probative to any material issue at trial.

Next, plaintiffs argue that the trial court erroneously admitted testimony from Dr. Gallagher regarding information contained in the Physician's Desk Reference (PDR) as well as the PDR itself.

During trial, evidence was admitted suggesting that Steinkirchner may have taken the anti-depressant drug Zoloft a few hours before consuming alcoholic beverages. On direct examination, Dr. Spitz, plaintiffs' expert witness, testified that Zoloft enhanced the effect of alcohol on the individual. Dr. Spitz also expressly acknowledged that the PDR was an authoritative book published by drug companies to assist physicians in understanding how drugs work and the effects they may have on individuals taking them.

Subsequently, Dr. Gallagher, Arbor Drugs' expert witness, testified on direct examination that the PDR was an authoritative source and, according to the PDR, Zoloft had not been shown to increase the mental and motor skill impairment caused by alcohol. Dr. Gallagher then read the language regarding the effects of Zoloft on alcohol directly from the PDR, which stated "Zoloft has not been shown in experiments with normal subjects to increase the mental and motor skill impairment caused by alcohol." Over plaintiffs' hearsay objection, the trial court allowed the testimony.

An expert witness may rely on hearsay or other non-record evidence in formulating opinions and conclusions. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998). Therefore, the trial court did not abuse its discretion in permitting Dr. Gallagher to read the language from the PDR on which he relied in formulating his opinion and conclusion into evidence.

Moreover, plaintiffs' argument that the evidence was improperly offered as substantive evidence rather than for impeachment, while not raised below and technically abandoned on appeal, see *Herald Co v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997), is without merit. The record reveals that Dr. Gallagher's reference to the statement in the PDR regarding the marginal effect of Zoloft on alcohol was offered to impeach Dr. Spitz' testimony to the contrary. See *Dziurlikowski v Morley*, 143 Mich App 729, 733; 372 NW2d 648 (1985), aff'd 428 Mich 132; 405 NW2d 863 (1987). Impeachment testimony may be elicited on direct examination of another witness, not only on cross-examination of the witness being impeached. See *Ellison v Wayne Co General Hosp*, 100 Mich App 739, 746; 300 NW2d 392 (1980), modified on other grounds 411 Mich 988 (1981).

Finally, plaintiffs' argument that the evidence was inadmissible simply because it was prejudicial to their case is wholly without merit. Evidence that is not unduly prejudicial, see MRE 403, is not inadmissible simply because it would be harmful to an opponent's case. See *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 181; 475 NW2d 854 (1991). The trial court did not abuse its discretion in admitting Dr. Gallagher's testimony.

With respect to the admission of the PDR itself into evidence at trial, plaintiff contends and defendant concedes that the PDR was improperly admitted as an exhibit. MRE 707; *Jones v Bloom*, 388 Mich 98, 118; 200 NW2d 196 (1972); *Sponenburgh v Wayne Co*, 106 Mich App 628, 643-644; 308 NW2d 589 (1981); *Bivens v Detroit Osteopathic Hosp*, 77 Mich App 478, 488-491; 258 NW2d 527 (1977), rev'd on other grounds 403 Mich 820; 282 NW2d 926 (1978). We agree.

However, any error in the admission of the PDR is deemed harmless and "does not require reversal unless a substantial right of the party is affected." MCR 2.613(A); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). We find that the erroneous admission of the PDR was harmless and did not affect any substantial right of plaintiffs in light of Dr Spitz' explicit acknowledgment that the PDR was an authoritative source, see *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 600-601; 440 NW2d 417 (1989), Dr. Gallagher's testimony on direct examination regarding the effect of Zoloft on alcohol as stated in the PDR, and the substantial evidence concerning Steinkirchners' intoxication at the time of the accident. Accordingly, reversal is not warranted.

Lastly, plaintiffs claim that the trial court erred in allowing Dr. Gallagher to rely on hearsay testimony from witnesses who were deposed in preparation for trial but did not testify at trial in formulating his opinion.

As noted above, there is no rule precluding an expert witness from relying on hearsay or other non-record evidence, including deposition testimony of non-testifying witnesses, in formulating their opinions and conclusions. *Forest City Enterprises, supra* at 73; *Tiffany, supra* at 267. An opposing party that disagrees with the facts or data on which the expert relied, or who wants to challenge the expert's conclusions based on the information provided, may cross-examine the witness to reveal any inconsistencies in the evidence or to rebut the expert's testimony. *Lake Oakland Heights Park Ass'n v Waterford Twp Oakland Co*, 6 Mich App 29, 33; 148 NW2d 248 (1967). We find nothing improper with Dr. Gallagher's reliance on deposition testimony of non-testifying witnesses to formulate his opinion. If plaintiffs disagreed with his statements or opinions, they were free to challenge his testimony and the information on which he relied on cross-examination.

In light of our decision to affirm the no cause of action verdict in favor of defendants, we need not address plaintiffs' remaining issue regarding damages.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder